ORAL ARGUMENT NOT YET SCHEDULED

Case No. 16-1031

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Natalie Ruisi and Michael Peluso,
Petitioners,

v.

National Labor Relations Board,
Respondent.

On Petition for Review of a Decision and Order of the National Labor Relations Board

PETITIONERS' REPLY BRIEF

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GLOSSARY OF ABBREVIATIONS

Administrative Law Judge	("ALJ")
Checkoff authorization	("checkoff")
Joint Appendix	("JA")
National Labor Relations Act	("NLRA" or "Act")
National Labor Relations Board	("NLRB" or "Board")
Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226, and Bartenders Union, Local 165	("Union")

ARGUMENT

I. BOARD COUNSEL'S NEW EXPLANATIONS CANNOT BE CONSIDERED BY THIS COURT.

The Board's Order contains a cursory conclusion that the Union's unwritten policy did not violate the duty of fair representation. The Board Counsel's brief contains a bevy of newly minted explanations for its Order upon which it cannot properly rely. *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) ("The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based."). This Court has consistently found Board Counsel cannot advance "*any* rationale other than the one supplied in [the Board's] decision and order," *NBCUniversal Media, LLC v. NLRB*, 815 F.3d 821, 829 (D.C. Cir. 2016) (emphasis added), and cannot "fill in critical gaps in the Board's reasoning." *Point Park Univ. v. NLRB*, 457 F.3d 42, 50 (D.C. Cir. 2006); *see also Williams Gas Processing-Gulf Coast Co. v. FERC*, 373 F.3d 1335, 1345 (D.C. Cir. 2004) ("It is axiomatic that [the Court] may uphold agency orders based only on reasoning that is fairly stated by the agency in the order under review."); *W. Union Corp. v. FCC*, 856 F.2d 315, 318 (D.C. Cir. 1988) ("[*P*]*ost hoc* rationalizations by agency counsel will not suffice.").

As the Supreme Court noted in *Chenery*, the validity of an agency order depends upon the validity of the agency's contemporaneously given reasons. Board Counsel is bound to the Board's written decision as a matter of separation of

powers. *See Church of Scientology v. IRS*, 792 F.2d 153, 165 (D.C. Cir. 1986) (Silberman, J., concurring) ("The precept that the agency's rationale must be stated by the agency itself stems from proper respect for the separation of powers among branches of government."). This rule ensures the Board, not its attorneys, is accountable for Board decisions. The Board issued a narrow Order bereft of analysis and now, realizing the mistake, its Counsel has resorted to broad arguments, speculations, and findings not appearing in the Order.[1] Accordingly, the Board's Order deserves no deference here.

The Board's Order adopted the rulings, findings, and conclusions of the ALJ. (JA 403). Specifically, the Board stated: "[w]e agree with the judge's finding that the Respondent's action was not so far outside a wide range of reasonableness as to be irrational," and cited cases purporting to support that proposition. *Id.* (citations & quotation omitted). The Board also accepted the ALJ's legal conclusion that there is no "affirmative obligation on the part of a union to notify its members of their anniversary date, especially on the basis of a telephone call." *Id.* at 407. Based on this, the ALJ and Board held that requiring Ruisi and Peluso to

[1] In one of the more egregious examples, the Board's Brief notes: "the Union at all times acted honestly in carrying out its policy." Board Br. 10. This grossly overstates the ALJ's credibility findings, which the Board specifically adopted. The ALJ never found the Union acted with "complete honesty" in adopting an unwritten policy that date requests must be in writing. He only found the Union witness credible in her testimony that she did not express glee at Ruisi missing her checkoff revocation window-period. (JA 407).

ask for their window-periods in writing was "not an unreasonable request" and, therefore, did not violate the "arbitrary" prong of the duty of fair representation. *Id.*

In an about-face, Board Counsel now claims its Order was based on a fact-based analysis of the reasonableness of the Union's policy. Board Counsel argues the Union's refusal to give Ruisi and Peluso their fifteen-day window-periods over the telephone was reasonable *because*: (1) it is private information; (2) the Union has an interest in verifying who the requestor is; and (3) the Union has an interest in protecting itself from litigation if it verbally gives out the wrong date over the telephone. Board Br. 20. However, there was no *because* in the Board's bare Order or the ALJ's opinion. Both decisions only offered the legal conclusion that the Union did not violate the duty of fair representation by creating an unwritten policy refusing to disclose window-period dates over the telephone. Board Counsel cannot fill in this "critical gap[]" in the Board's reasoning by creating new facts, arguments, and speculations in its appeal brief. *Point Park Univ.*, 457 F.3d at 50.

The Board disingenuously states that Ruisi and Peluso's Brief did not address these newly articulated interests,[2] but they are irrelevant post-hoc explanations. *See NBCUniversal*, 815 F.3d at 829; *Point Park Univ*, 457 F.3d at

[2] The Board ignores these post-hoc rationales were preemptively addressed in Ruisi's opening brief. Pet'rs Br. 21-22. The *Union* did make these arguments below, but the Board never adopted or commented on them.

50; *Williams Gas*, 373 F.3d at 1345. Ruisi and Peluso brought this appeal of the Board's Order, as it was written, based upon what this Court may properly review. It is Board Counsel that is now ignoring this fundamental separation of powers principle.

In short, Board Counsel's new explanations absent from the Board's Order must be ignored. Because the Order is silent as to any underlying factual rationale—or any analysis of the second and third prongs of the duty of fair representation—it must be overturned for the reasons stated in Ruisi and Peluso's Brief.

II. BOARD COUNSEL'S PURE SPECULATIONS ARE NOT SUFFICIENT TO OVERCOME THE UNION'S FIDUCIARY DUTY TOWARDS THE EMPLOYEES IT REPRESENTS.

Even assuming, *arguendo*, Board Counsel's new explanations were somehow before the Court, they fail to offer a basis for affirmance. It is long settled that the duty of fair representation requires the Board to properly balance "the tradeoffs between the interests of the [union] and the rights of individuals." *Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6*, 493 U.S. 67, 77 (1989); *Machinists Local Lodge 2777 (L-3 Commc'ns)*, 355 NLRB 1062, 1064 (2010) ("In applying the arbitrary standard here, we accordingly consider the balance between the competing interests: the legitimacy of the union's asserted justifications for its procedures and the extent to which they burden employees'

[rights] . . . ."). The Board's Order and Board Counsel's new explanations attempt no balancing of the Union's purported interests with employees' fundamental rights. Board Counsel simply lists some newly conjured union rationalizations and elevates them over the right of individuals to have easy access to critical and time-sensitive information necessary to exercise their rights under the Act.

Board Counsel argues any explanation, however slight, justifies the Union's unwritten policy and actions under the duty of fair representation. Board Counsel obfuscates the time-sensitive nature of window-period date information, or how easily the Union could have accessed Peluso's information (in under two minutes) and provided it over the telephone. The Board also fails to recognize that employees do not have to "jump through hoops" to get the vital information they need about their rights. *Cal. Saw & Knife Works*, 320 NLRB 224, 292 (1995) (adopting ALJ order that found certified mail requirement unlawfully required employees to "jump through hoops" to leave a union). Indeed, the Board requires unions to meet their fiduciary duty by promptly providing relevant information to employees, such as copies of the collective bargaining agreements. *Law Enf't & Sec. Officers, Local 40B (S. Jersey Detective Agency)*, 260 NLRB 419, 420 (1982) (the opportunity to examine the agreement is necessary for an employee "to understand his rights under [the contract] and . . . to determine the quality of his representation under [it]"); *Vanguard Tours, Inc.*, 300 NLRB 250, 265 (1990)

(union violated Section 8 of the NLRA when union steward withheld the collective bargaining agreement from unit employees).

Here, the Board's analysis is bereft of any recognition of the difficulties employees face, having only a fifteen-day annual window-period to revoke a checkoff. Given that union-imposed time constraint, is it fair to make individuals rely on the renowned speed of the Postal Service, and the timely response of a "busy" union official, in order to receive a simple date during which they can revoke their checkoff? This problem is compounded by the undisputed fact that individuals, after receiving their dates, must send a second letter, properly revoking their checkoff during that narrowly proscribed fifteen-day period. This case is particularly egregious because the Union official had immediate access to Ruisi's and Peluso's fifteen-day window-periods. The official's refusal to orally disclose the window-period dates because of an "unwritten" policy is the height of arbitrariness.

The consequences of missing the operative revocation date are significant, which the Board ignores. If employees miss their window-period by even one day, they are forced to pay dues for an entire year until they are able to send a letter within their fifteen-day window-period. Not surprisingly, the Union allows its pecuniary interests to trump its fiduciary duties. The Union stiff-arms those who wish to revoke their checkoffs, but who mistakenly do so beyond the fifteen-day

period. Here, the Union accepted Peluso's membership resignation but cavalierly rejected his checkoff revocation because it wrongfully believed his letter was postmarked one day late. (JA 407). This is a quintessential trap for the unwary.

In contrast, the asserted union self-interests are not sufficient to deny employees the requested information over the telephone. As to any purported "privacy" interest, there is nothing special or innately secretive about a fifteen-day window-period that necessitates a written letter.[3] Board Counsel does not explain how simple knowledge of a fifteen-day window-period can be used to commit any privacy violation. Nor does Board Counsel explain how a fifteen-day window is inherently secret or confidential. Moreover, the Board does not dispute it regularly requires the disclosure of employee information to third parties (e.g., unions seeking to organize) that is *actually private*, such as home addresses, telephone numbers, and e-mail addresses. Pet'rs Br. 21-22, n.9. Nor does it dispute this Union gives out other dates over the telephone without verification, such as the date the employee joined the Union. Pet'rs Br. 20. Hypocritically, the Union and the Board consider only window-periods—which are extremely time-sensitive—to be "private," but membership dates and employees' truly personal information,

[3] To prove this point, the Union produced a sample card at the hearing as Respondent's Exhibit 4 (JA 155-56; 286-87). The Union did not redact the member's name or her window period dates, but only the individual's social security number, telephone number, and part of her address.

like home addresses, non-private. The only real difference between a window-period and a membership anniversary date is not a confidentiality interest, but the Union's pecuniary interest in making it more difficult for employees to stop paying dues. This alone proves the Union is improperly acting on behalf of its own monetary self-interest.

Board Counsel, for the first time, argues the Union has an interest in avoiding litigation over giving out wrong window-period dates. It argues the Union can require a written request for dates so it can provide a written response. However, if the Union wants to protect itself against litigation, it can prudently do so without forcing employees to send a letter just to find out a date to exercise their legal rights. For example, here, in response to an employee's telephone call seeking the window-period dates, the Union can verbally give out the dates over the telephone—the Union admitted window-periods take less than two minutes to look up on its computer system (JA 53-54)—and then follow up with a letter to the employee reiterating those dates.[4] Here, the Board cannot claim the Union needed extra time to verify Peluso's dates on the written card because his handwritten card was already scanned into the Union's computer system. (JA 50, 174-75).[5] Despite

[4] The Union possesses address and phone number information for every employee in its computer system. (JA 52).

[5] The Board's position is inconsistent with the facts of this case. A written demand for, and response to, a date request is not a panacea to end litigation, nor does it

the fiduciary obligations the Union owes to all employees it represents, the Board is allowing the Union's pecuniary self-interest to outweigh employees' Section 7 rights for information.

III. THE BOARD GOES OUTSIDE THE RECORD WHEN IT CLAIMS RUISI AND PELUSO COULD LEARN THEIR WINDOW-PERIODS IN OTHER WAYS.

Board Counsel speculates there were "several ways" Ruisi and Peluso could learn of their window-period dates. Board Br. 14-15. That is far from accurate. Contrary to the speculation, nothing in the record suggests the Union gave Ruisi or Peluso copies of their authorization cards when they initially joined the Union. Moreover, the Employer clearly stated to Ruisi it only maintained the dates the Employer actually began deducting union dues, making that avenue a dead end. (JA 406-07). Lastly, suggesting employees take a shot in the dark and "guess" their dates is the type of arbitrary, unlawful conduct that frustrates employee rights. Board Br. 15. As the Supreme Court noted: "The complete freedom of individual choice in this area, undampened by the necessity of such preliminary dealings with the labor organization to make it effective, may seem unfortunate to labor organizations, but it is a problem with which we think Congress intended them to live." *Felter v. S. Pac. Co.*, 359 U.S. 326, 336 (1959).

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ensure employees are told the correct information. In this case, the Board found the Union's written response to Peluso improperly rejected his revocation because the Union miscounted its own window-period dates. (JA 407).

Here, there is no difference between the Board's "guess" option and what the Union requires. The Union requires employees to guess once in order to obtain their dates. Employees will not know their window-period dates unless they attempt to revoke their checkoff on an arbitrary date and request their actual date in a letter. Given the window-period is only fifteen days once a year, there is a low probability an employee will properly send that written request within the necessary time frame. In reality, this "hide-the-ball" method of refusing to disclose the window-period dates until someone, in effect, has already tried to resign and revoke, is "[a]dditional paper work or correspondence, after [one] has indicated his desire to revoke in writing, [which] might well be some deterrent, so Congress might think, to the exercise of free choice by the individual worker." *Id*. In sum, the other avenues the Board imagines for employees like Ruisi and Peluso are all dead ends.

IV. *BOSTON GAS* AND *POSTAL SERVICE* DO NOT SUPPORT THE BOARD'S POSITION.

The Board places more weight on *Postal Service*, 302 NLRB 701 (1991), than it can bear. The Board contends *Postal Service* upheld the procedure of submitting a form to discover an anniversary date, but that is not accurate. *Postal Service* considered whether it was an unfair labor practice for a union and employer to *conceal* from employees the fact they could call a Postal Service office to learn of their window-period dates. The employees there did not have to

submit a form to learn their anniversary dates; rather, they had a "short-cut" option to call a personnel office to receive the dates over the telephone. *Id.* at 702. Individual agents of the union and employer told employees they could learn their window-periods *only* by submitting a form to the employer's processing center, rather than providing them with the "short-cut" option. *Id.*

In that case, however, the union official told employees they had to submit a form *because the official did not possess the dates and did not know employees could call and ask for the dates from the post office data center*. The Board noted, "[t]he judge reasoned that [the Union official] knew or should have known of the "short-cut" procedure for leaving the anniversary dates . . . . [W]e find no basis for concluding that [the Union official] either knew or should be charged with knowing about any other method of obtaining anniversary dates . . . ." *Id.* This case is completely different because Ruisi called and spoke with the *union employee in charge of keeping the window-period dates*. That union official had ready access to the dates, and could give them out over the telephone, but chose not to—based on an unwritten policy—to solely protect the Union's pecuniary interests.

Boston Gas Co., 130 NLRB 1230 (1961), is inapposite and irrelevant for the reasons stated in Ruisi and Peluso's opening brief. Pet'rs Br. 31. Board Counsel admits as much, stating *Boston Gas* does not settle the question presented, but only concerns the "applicable legal standards" to the case. Board Br. 18 n.5. The

Board's Order did not explain how the legal standard in *Boston Gas* is applicable to this case. In reality, *Boston Gas* was not even applying the three-pronged standard of the duty of fair representation, nor attempting to balance employee interests against the union's collective interests. *See*, *supra*, pp. 4-5. Moreover, a concurring opinion in *Boston Gas* specifically noted the Supreme Court's analysis in *Felter*, which dealt with a requirement that an employee could only revoke a checkoff on a union-provided form, did not apply because the *Boston Gas* requirement that an employee send a revocation to the union and the employer did not require such a preliminary dealing. *Boston Gas*, 130 NLRB at 1232 (Member Jenkins, concurring) (quoting *Felter*, 359 U.S. at 336). Here, the Union's refusal to furnish window-period dates except in response to a written request creates the exact situation that the concurrence in *Boston Gas* distinguished, where in order to revoke, an employee must engage in an unduly burdensome "preliminary dealing with the labor organization." *Id.* (citation & quotation omitted).

Moreover, in its attempt to shoehorn *Boston Gas* onto this case, the Board overlooks the fact that revoking a checkoff and requesting information about an individual's right to revoke a checkoff are two distinct actions. Federal law requires an actual checkoff authorization be submitted in writing. *See* 29 U.S.C. § 186(c)(4). A mere request for information over the telephone, however, lacks the

legal effect of actually cancelling a checkoff, and rationally must be subject to a different standard.

CONCLUSION

The Board's Order is unsupportable and the Union's unwritten, informal policy has no valid justification. The Union's policy is arbitrary, discriminatory, and in bad faith. Moreover, the Board erroneously applied established law to the facts at issue, ignored other critical facts, and belatedly relies upon extra-record suppositions. The Board's Order must be reversed and the Petition granted.

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CERTIFICATE OF SERVICE

I hereby certify that on August 19, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I further certify that the foregoing document was served on all parties or their counsel of record through the appellate CM/ECF system as they are registered users.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains 3,055 words in accordance with the word count typed in 14 point typeface and is in compliance with the type-volume limitations of FRAP 32(a)(7)(B) and (C) and this Court's briefing order.

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